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Shahrizam bin Damsah v Mahathir bin Mohd Isa & Anor

HIGH COURT (SANDAKAN) — CIVIL APPEAL NO SDK-12B-5/8 OF 2013
DOUGLAS SIKAYUN JC
15 NOVEMBER 2013

Damages — Assessment — Appeal against assessment — Driver found to be 100% liable for accident caused — Negligence caused immediate death of passengers — Loss of dependency — Whether multiplicand for purpose of calculating dependency claim should be take home pay or nett income

In the sessions court, the appellant was found 100% liable for encroaching onto the lane of the first respondent in his attempt to overtake a lorry in front of him, causing a head on collision with the first respondent's vehicle. The appellant's negligence caused the immediate death of the first respondent's wife ('the deceased') and their sons. After the action was commenced by the respondents, the appellant's insurer made an offer pertaining to damages to the first and second respondents and the first respondent's deceased son which were duly accepted by the respondents. At the end of the trial in the sessions court, the sessions court judge ('the SCJ') awarded the sum of RM435,729.92 as loss of dependency; RM10,000 for bereavement; RM2,000 for funeral expenses; costs of RM15,575 and interest at the rate of 5%pa from the date of the accident until full payment. The appellant accepted the quantum of the damages awarded by the SCJ except for loss of dependency of RM435,729.92. In the present appeal, it was argued that the SCJ had failed to appreciate that the multiplicand for the purpose of calculating the dependency claim should be the take home pay or nett income of RM1,551.14 of the gross pay of RM3,404.14; the respondent's maximum claim for loss of dependency should only be RM297,818.88; and pursuant to the legal principles in *Ali Tan & Ors v Mazlan Bidin & Anor* ('*Ali Tan*') and *Rohani a/p Tengkah (widow suing on her behalf and on behalf of her two children, as dependence of Zinuddin bin Sipoh, deceased) v Zainal bin Lani & Anor* ('*Rohani Tengkah*').

Held, allowing the appeal:

(1) The deceased was a teacher and as evidenced by her salary slips, her salary was RM3,404.14 which consisted of the monthly-base salary of RM2,238.55 and monthly remunerations and allowances of RM1,169.59. In reference to case authorities, the multiplicand should be the take home pay of the deceased and not the gross income. The dependency claim must be deducted from the deceased's living expenses. As any living expenses that would have been incurred by the deceased at

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the time of her death was not proven by the appellant or admitted by the respondent, the SCJ was right to make a deduction of approximately 1/3 of the deceased's earning to account for living expenses. By using the deceased's take home pay as multiplicand and by deducting 1/3 of the deceased's personal living expenses, the value of dependency claim of the first respondent was RM198,545.92 ((RM1,551.14 x 1/3) x 12months x 16 years)) (see para 6, 10, 15, 17–18).

[Bahasa Malaysia summary

Di mahkamah sesyen, perayu didapati bertangungjawab 100% kerana masuk ke lorong responden pertama dalam percubaannya untuk memotong lori di hadapannya, menyebabkan pelanggaran hadapan dengan kenderaan responden pertama. Kecuaian perayu menyebabkan kematian serta merta isteri responden ('si mati') dan anak-anak lelaki mereka. Selepas tindakan dimulakan oleh responden-responden, syarikat insurans perayu membuat tawaran berkaitan ganti rugi kepada responden-responden pertama dan kedua dan anak lelaki responden pertama yang meninggal yang mana diterima oleh responden-responden. Pada akhir perbicaraan mahkamah sesyen, hakim mahkamah sesyen ('HMS') mengawardkan sejumlah RM435,729.92 sebagai kehilangan tempat bergantung; RM10,000 kematian; RM2,000 perbelanjaan pengebumian; kos sebanyak RM15,575 dan faedah pada kadar 5% setahun dari tarikh kemalangan sehingga bayaran penuh. Perayu menerima kuantum ganti rugi yang diawardkan oleh HMS kecuali untuk kehilangan tempat bergantung sebanyak RM435,729.92. Dalam rayuan ini, ia dihujahkan bahawa HMS telah gagal untuk menilai bahawa *multiplicand* untuk tujuan mengira tuntutan kehilangan tempat bergantung sepatutnya adalah gaji atau pendapatan bersih sebanyak RM1,551.14 daripada gaji kasar sebanyak RM3,404.14; tuntutan maksimum responden untuk kehilangan tempat bergantung sepatutnya adalah RM297,818.88; dan berikutan prinsip undang-undang dalam kes *Ali Tan & Ors v Mazlan Bidin & Anor* ('*Ali Tan*') dan *Rohani a/p Tengkah (widow suing on her behalf and on behalf of her two children, as dependence of Zinuddin bin Sipoh, deceased) v Zainal bin Lani & Anor* ('*Rohani Tengkah*').

Diputuskan, membenarkan rayuan:

(1) Si mati adalah seorang guru dan seperti yang dibuktikan oleh penyata gajinya, gajinya adalah RM3,404.14 yang termasuk gaji asas bulanan sebanyak RM2,238.55 dan ganjaran dan elaun bulanan sebanyak RM1,169.59. Dalam merujuk kepada autoriti-autoriti kes, *multiplicand* sepatutnya adalah gaji bersih si mati dan bukan pendapatan kasar. Tuntutan kehilangan tempat bergantung mesti dipotong daripada perbelanjaan harian si mati. Memandangkan perbelanjaan harian yang ditanggung oleh si mati pada masa kematiannya tidak dibuktikan oleh perayu atau dinyatakan oleh responden, HMS adalah betul untuk

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membuat pemotongan lebih kurang 1/3 daripada pendapatan si mati untuk mengira sebagai perbelanjaan harian, nilai tuntutan kehilangan tempat bergantung responden pertama adalah RM198,545.92 ((RM1,551.14 x 1/3) x 12 bulan x 16 tahun)) (lihat perenggan 6, 10, 15, 17–18).]

Notes

For a case on appeal against assessment, see 6 *Mallal's Digest* (4th Ed, 2012 Reissue) para 272.

Cases referred to

Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor [1995] 4 MLJ 182; [1995] 4 CLJ 317, HC (refd)

Ali Tan & Ors v Mazlan Bidin & Anor [2012] 4 CLJ 736, CA (refd)

Jub'il Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd [2001] 6 MLJ 669; [2001] 4 CLJ 599, HC (refd)

Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor [1990] 1 MLJ 443, HC (refd)

Rohani a/p Tengkah (widow suing on her behalf and on behalf of her two children, as dependence of Zinuddin bin Sipoh, deceased) v Zainal bin Lani & Anor [2004] 5 MLJ 289; [2004] 2 CLJ 108, HC (refd)

Legislation referred to

Civil Law Act 1956 s 7(3)(iv)(c), (d)

Syarulnizam Salleh (Alex Pang & Co) for the appellant.
(MG's Legal Chambers) for the respondent.

Douglas Sikayun JC:

INTRODUCTION

[1] Let me affirm the decision of the learned SCJ in finding 100% liability against the appellant as it was abundantly clear that the appellant who was driving a motorcar No WQS 2655 on 3 December 2011 at about 3.15pm had encroached onto the lane of the first respondent in his attempt to overtake a lorry in front of him and this led to a head on collision with the first respondent's vehicle SS8311L when the first respondent was driving from Segaliud towards Sandakan. The appellant's negligence had caused immediate death to the first respondent's wife Ms Azliana bt Aziz (the deceased) and son Muhammad Mukhriz Rayyan bin Abdullah.

[2] After this action was commenced by the respondents, the appellant's insurer made an offer pertaining to damages to the first and second respondent and the first respondent's deceased's son which were duly accepted by the

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respondents. The trial proceeded in the sessions court were those damages pertaining to the deceased only. At the end of the trial, the learned SCJ awarded the sum RM435,729.92 as loss of dependency, RM10,000 for bereavement, RM2,000 for funeral expenses, costs of RM15,575 and interest at the rate of 5%pa from the date of accident until full payment.

[3] The appellant had accepted the quantum of the damages awarded by the learned SCJ except for the loss of dependency of RM435,729.92 which is the subject matter of the appeal herein. The reasons for this appeal are that:

(a) the learned SCJ failed to appreciate that the multiplicand for the purpose of calculating the dependency claim should be the take home pay or nett income of RM1,551.14 instead of the gross pay of RM3,404.14;

(b) the learned SCJ failed to appreciate that the respondent's maximum claim for lost of dependency should only be RM297,818.88 which is a calculation using the take home pay as the multiplicand; and

(c) alternatively the learned SCJ failed to appreciate that pursuant to the legal principles in *Ali Tan & Ors v Mazlan Bidin & Anor* [2012] 4 CLJ 736 and *Rohani a/p Tengkah (widow suing on her behalf and on behalf of her two children, as dependence of Zinuddin bin Sipoh, deceased) v Zainal bin Lani & Anor* [2004] 5 MLJ 289; [2004] 2 CLJ 108, the 1/3 deduction for living expenses ought to have been calculated based on the deceased's take home pay totalling up to RM198,545.92 ((RM1,551.14 x 1/3) x 12 months x 16 years).

FINDINGS OF THE COURT

Calculation of dependency claim — whether the multiplicand should be the take home pay

[4] The deceased was 28 years of age at the time of the accident. As she was less than 30 years at the time of death, by virtue of s 73(iv)(d) of the Civil Law Act a multiplier of 16 years is to be used in calculating the loss of dependency. This is not disputed by the appellant.

[5] The only issue appealed upon by the appellant is that the learned SCJ had erred in taking the gross income of the deceased instead of her net income for the purpose of calculating the loss of dependency to the respondents.

[6] The deceased was a teacher at Sekolah Kebangsaan Segaliud Sandakan and, as evidenced by her salary slips, the monthly salary of the deceased was RM3,404.14 which consists of the monthly base salary of RM2,238.55 and monthly remunerations and allowances of RM1,165.59.

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[7] However, in the same salary slips, the monthly deductions were as follows: A

(a) monthly deduction of RM333 for the contribution to the deceased's Employment Provident Fund ('EPF');

(b) monthly deduction of RM1,275 for the deceased's personal loan with Bank Simpanan Nasional; and B

(c) monthly deduction of RM245 for the contribution to ANGKASA (Angkatan Koperasi Malaysia).

C

[8] When we deduct the monthly deductions, the deceased's monthly net take home income is only RM1,551.14.

[9] The appellant submitted that the multiplicand to be used to calculate the loss of dependency should be the deceased's take home pay because this is the amount that the deceased would had received. D

[10] I have heard the arguments and read both the appellant and respondents' written submissions. Apparently, both parties have different stands or interpretations on the two Court of Appeals' decision of *Ali Tan*'s case and *Rohani Tengkah*'s case. The appellant is of the opinion that both cases had calculated the dependency claim with the multiplicand being the deceased's take-home pay whereas counsel for the respondents is of the view that the Court of Appeals had used the gross income of the deceased. E F

[11] Now, it has to be noted that none of the Court of Appeal cases had used the words *take home-pay* or *gross income* as submitted by both parties. In the case of *Rohani Tengkah*, the court merely used the words *monthly earnings* and decided that the whole of the deceased's earnings should have been taken as the starting point (as the base figure). Be it as it may, I believe that the monthly earning referred to by the Court of Appeal judges in the case of *Rohani Tengkah* is the monthly take home earnings because it was this income that the deceased took home every month and from which the deductions for living expenses would be made. G H

[12] I also say this because as early as 1989 as evident from the case of *Rebecca Mathew & Ors v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd & Anor* [1990] 1 MLJ 443 the court had already used the net income or take home pay in determining the multiplicand to calculate the loss of dependency. At p 443, Justice KC Vohrah said: I

> with respect, in the circumstances of this case, I think the more sensible approach is the one advanced by counsel for the defendants; find the net income of the deceased

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A and deduct from that a percentage representing the deceased's personal living expenses; the remainder is the value of the dependency for the Plaintiffs.

[13] The same approach has been taken by the court in the case of *Jub'il Mohamed Taib Taral & Ors v Sunway Lagoon Sdn Bhd* [2001] 6 MLJ 669; [2001] 4 CLJ 599 where the High Court judge, Justice Tee Ah Sing, had used the take-home pay as a starting point for the dependency claim.

[14] Premised on the above authorities, the multiplicand should be the take home pay of the deceased and not the gross income. At this juncture, the dependency claim would be RM297,818.88 (RM1,551.14 x 12 months x 16 years).

[15] Alas this does not end here. The dependency claim must be deducted from the deceased's living expenses. This is provided for under s 7(3)(iv)(c) of the Civil Law Act 1956 which states as follows:

> take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be living expenses of the person deceased at the time of his death.

[16] In the case of *Abdul Ghani bin Hamid v Abdul Nasir bin Abdul Jabbar & Anor* [1995] 4 MLJ 182; [1995] 4 CLJ 317, Justice Abdul Malik Ishak stated as follows:

> it is only logical that some part of the Plaintiff's earnings must have been devoted to his own maintenance. But no matter how logical it may appear to be, it can only be deducted if the amount is either admitted by the Plaintiff or proved by the Defendant.

[17] As any living expenses that would have been incurred by the deceased at the time of the death was not proven by the appellant or admitted by the respondent, the learned SCJ was right to make a deduction of approximately 1/3 of the deceased's earnings to account for living expenses. This decision was in line with *Ali Tan*'s and *Rohani Tengkah*'s cases discussed earlier.

[18] Therefore, by using the deceased's take home pay as multiplicand and by deducting 1/3 of the deceased's personal living expenses, the value of dependency claim of the first respondent is RM198,545.92 ((RM1,551.14 x 1/3) x 12 months x 16 years).

[19] Based on the foregoing, I allow this appeal with cost of RM2,000 to the appellant.

Appeal allowed.

Reported by Afiq Mohamad Noor